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LEGISLATIVE ETHICS, 1973

JAMES R. NOWLIN*

Labeled "The Reform Session" by many legislators and by representatives of communications media, the 63d Regular Session of the Texas State Legislature convened on January 9, 1973. This was the first occasion for a general legislative session in Texas since the conviction of former House Speaker Gus F. Mutscher, former Representative Tommy Shannon, and an aide in Mr. Mutscher's office on bribery charges related to the widely publicized "Sharpstown Bank scandal." In addition to "Sharpstown," recent indictments of several present and former state legislators on numerous counts of theft of state funds and property brought unusual and encouraging political pressures from a large segment of the general public for substantive action, not merely traditional lip service, for change in state legislative procedures and closer statutory supervision of state officials. Under an unusually heavy cloud of public distrust and skepticism about the veracity of elected members of both the legislative and executive branches of state government in Texas, a newly elected house and senate and a newly elected Governor began work on what was to be the implementation of reform measures. It was the beginning of the hardest-working regular session—in terms of hours spent in session and in extensive committee and subcommittee hearings—in the memory of even the most seasoned senior legislators.

The spirit of reform proved to be the driving force behind the successful campaign of Representative Price Daniel, Jr. for the position of House Speaker. Even before the legislature convened, Representative Daniel and his staff, in consultation with many house members, had drafted what appeared on the surface to be numerous significant changes in house rules of procedure, from proposals further restricting the number of house standing committees (from 45 in 1959 to 21 in 1973) to provisions calling for institution of a modified seniority rule.¹

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1. Changes were proposed which, if properly implemented, would strike at one of the greatest weaknesses long prevalent in the Texas legislative branch: the overwhelm-

The main body of reform legislation considered by the 63d Legislature consisted of nine house bills and one senate joint resolution.² One should not be misled by the fact that all of the major proposals for statutory, internal legislative reform were initiated in the house of representatives, since the end product in most instances represented significant alteration by the senate and compromises engineered within house-senate conference committees.

Although each of the so-called reform measures represents significant effort for change by many state legislators, none affects the legal profession and the attorney-legislator more than the "Ethics Bill" (H.B. 1). For that reason, as well as for legitimate space limitations, the following discussion will give particular attention to this measure.

ing and unchallenged power given by procedural rules to the presiding officers, *i.e.*, the Speaker of the House and the Lieutenant Governor. Unfortunately, the suggested changes in house rules did not go far enough in specifically limiting the power of the presiding officer and extending to the members of the house a greater degree of independence.

Reform in the conduct of the house speakership was dealt an additionally severe blow through failure of a measure which would have statutorily limited an individual to one term in that office. Although approved in the house, the measure failed as a result of constitutional questions raised by the Attorney General. TEX. ATTY GEN. LTR. ADVISORY No. 18 (April 27, 1973). Advances made in this area during the 1973 regular session came more from the forbearance of the House Speaker to engage in past excesses than in any limitation by rule or statute.

2. H.B. 1, 63d Leg., Reg. Sess. (1973) which provided for the creation of a code of ethics and for financial disclosure by certain state officers and employees and was codified at TEX. REV. CIV. STAT. ANN. art. 6252-9b, §§ 1-15 (Supp. 1974); H.B. 2, 63d Leg., Reg. Sess. (1973) which related to activities of persons engaged in influencing legislation or administrative action and was codified at TEX. REV. CIV. STAT. ANN. art. 6252-9c, §§ 1-17 (Supp. 1974); H.B. 3, 63d Leg., Reg. Sess. (1973) which related to the requirement that meetings of governmental bodies be open to the public and was codified at TEX. REV. CIV. STAT. ANN. art. 6252-17 (Supp. 1974); H.B. 4, 63d Leg., Reg. Sess. (1973) which related to the regulation of political contributions and expenditures and was codified in amendments to TEX. ELECTION CODE ANN. arts. 3.05, 14.01, 14.08, 14.10 (Supp. 1974); H.B. 5, 63d Leg. Reg. Sess. (1973) which would have put statutory restrictions on joint legislative conference committees (approved by the house, rejected by the senate); H.B. 6, 63d Leg., Reg. Sess. (1973) which sought to clarify which governmental records are to be opened to the public and was codified at TEX. REV. CIV. STAT. ANN. art. 6252-17a (Supp. 1974); H.B. 7, 63d Leg., Reg. Sess. (1973) which proposed to limit house speakers to one full term in that office (approved by the house, rejected by the senate); H.B. 8, 63d Leg., Reg. Sess. (1973) which proposed to require public disclosure of who pays for the election of house speakers and how the money was spent and was codified at TEX. REV. CIV. STAT. ANN. art. 5428a, §§ 1-12 (Supp. 1974); H.B. 9, 63d Leg., Reg. Sess. (1973) which related to the making unlawful the use of threats and promises by candidates for Speaker of the House in order to obtain votes for that position and was codified at TEX. PENAL CODE ANN. arts. 36.03, 36.07 (Supp. 1974); S.J. Res. 8, 63d Leg., Reg. Sess. (1973) which proposed an amendment to the existing state constitution providing for annual sessions of the state legislature and a salary of not more than \$15,000 per year for state legislators. This proposal was approved by both houses for submission at the special constitutional amendments ratification election to be held November 6, 1973.

THE EMERGENCE OF THE ETHICS ISSUE

The fact that H.B. 1³ was the first bill introduced in the Texas House of Representatives during the 63d Legislature is indicative of the political, if not substantive, importance extended to the subject of internal reform of the Texas Legislature. Basic provisions and tenor of this "Ethics Bill" can be traced directly to an earlier bill which was initially considered, somewhat reluctantly, by the 62d Legislature, Regular Session, in 1972.⁴ The effectiveness of this new statute was diminished, if not destroyed when, on January 6, 1972, the Texas Attorney General issued a formal opinion indicating that it would not stand the test of constitutionality.⁵

Consideration of legislator ethics measures was not a novel event peculiar to the 62d and 63d Legislatures. Indeed, during several sessions prior to 1971, ethics bills of one kind or another were introduced either in the house or senate and often received approval, after close inspection and amendment, by one house of the legislature only to languish from lack of attention in the other.⁶ The authors of these earlier bills, as well as many other members, were undoubtedly sincere in their desire to develop clear statutory guidelines for legislators' conduct and to at least usher in a limited degree of reform prior to the decade of the seventies. There were, however, a sizeable number of legislators whose favorable votes on ethics legislation, which might unduly affect their personal conduct as state officials, were obtained only on a reasonable assurance that the other house would not let the measure see the light of day.

By virtue of salary (\$4,800.00 per year), service as a member of the Texas Legislature is viewed as a part-time vocation or even as an avocation. Because of this, many legislators were and are quite legitimately concerned that ethics legislation, regardless of the noble intent of its advocates, might be interpreted so as to unduly restrict their ability to earn a living wage in their full-time job at home. Most of these legislators would tend to agree with the view that, in

3. TEX. REV. CIV. STAT. ANN. art. 6252-9b, §§ 1-15 (Supp. 1974).

4. H.B. 203, 62d Leg., Reg. Sess. (1971) which was codified at TEX. REV. CIV. STAT. ANN. art. 6252-9 (Supp. 1974).

5. TEX. ATT'Y GEN. OP. NO. M-1039 (1972).

6. H.B. 676, 58th Leg., Reg. Sess. (1963); H.B. 79, 59th Leg., Reg. Sess. (1965); H.B. 417, 60th Leg., Reg. Sess. (1967); H.B. 133, S.B. 70, H.B. 854, 61st Leg., Reg. Sess. (1969); H.B. 13, H.B. 123, H.B. 127, H.B. 421, H.B. 435, H.B. 931, H.B. 1155, H.B. 1237, S.B. 86, S.B. 93, S.B. 227, H.J. Res. 18, H.J. Res. 96, S.J. Res. 15, S.J. Res. 55, 62d Leg., Reg. Sess. (1971).

a period when the biennial budget of the State of Texas amounts to nearly ten billion dollars,⁷ the state legislature should meet annually in regular (general) session and state legislators should receive a full-time salary with strict prohibitions against peripheral economic endeavors. This view has yet to attract sympathy from a majority of voting Texans, although the proposition will again be on the ballot for voter consideration at a special constitutional amendments election scheduled for November 6, 1973.⁸

With the revelation of the Sharpstown Bank scandals in early 1971, the issue of legislator ethics was brought into sharp perspective. Public pressure and voter reaction emphatically called for the 63d Legislature to enact guidelines for ethical conduct for state officials.

THE LEGISLATIVE REACTION

H.B. 1, as it was originally introduced by Representative James Nugent and Representative Larry Bales and numerous co-sponsors, was hailed as an effort to enact an ethics statute free from the constitutional objections raised by the Attorney General's opinion relating to the 1971 version.⁹ In fact, the measure, as introduced on January 10, 1973, was the most far-reaching and comprehensive of the numerous ethics bills previously introduced. On the basis of later opinions from the Texas Attorney General and a barrage of committee and floor amendments in both the house and the senate, the bill as finally enacted represented a significant alteration in several respects from the original version.

The high purpose of H.B. 1 is expressed in section 1 thereof:

[T]o strengthen the faith and confidence of the people of Texas in their state government, there are provided standards of conduct and disclosure requirements to be observed by persons owing a responsibility to the people of Texas and the government of the State of Texas in the performance of their official duties. It is the intent of the legislature that this Act shall serve not only as a guide for official conduct of these covered

7. \$9.7 billion for the 1974-75 biennium.

8. S.J. Res. 8, 63d Leg., Reg. Sess. (1973).

9. TEX. REV. CIV. STAT. ANN. art. 6252-9b (Supp. 1974). See TEX. ATT'Y GEN. OP. No. M-1039 (1972) declaring art. 6252-9 unconstitutional for (1) improper caption, (2) "overbroad" disclosure requirements violative of the Bill of Rights and the right of privacy, citing *City of Carmel-by-the-Sea v. Young*, 85 Cal. Rptr. 1 (1970), and (3) violation of equal protection rights due to the makeup of the ethics commission created by the statute.

persons but also as a basis for discipline of those who refuse to abide by its terms.¹⁰

Disclosure of private financial interests in either a general or specific manner was the central thrust behind the various proposed versions of the 1973 ethics bill. Most controversial in both house and senate were the questions of (1) who must disclose, (2) what must be disclosed, (3) what individual, agency, or commission should act as the depository and enforcing authority of the matter disclosed, (4) what activities should be prohibited, and (5) the constitutionality of disclosure requirements when viewed in conjunction with the principle of separation of powers among the branches of state government, the mandates of due process, privacy, the rights of equal protection, and the specificity of penal provisions.

Who Must Disclose

The original version of H.B. 1 required the filing of an affidavit by "[e]very state officer and state employee who has a substantial interest in a business entity which is licensed by any state agency except the office of the secretary of state or the comptroller of public accounts" ¹¹ This affidavit was required to be filed with a proposed "Ethics Commission" within 30 days after the date the individual assumes office or commences employment and was to contain material identifying the particular business entity, the nature of the individual's interest in the business entity, and the relationship between the state regulatory or licensing agency and that particular business entity.¹² In addition, the original measure required the general category of "every state officer and state employee" to file with the proposed ethics commission an affidavit at any time the individual "acquires or divests himself of a substantial interest in a business entity which is licensed by any state agency except the office of the secretary of state or the comptroller of public accounts" ¹³ Affidavits filed in accordance with this section of the original house bill were to be open to inspection by the public.¹⁴

As originally drafted and introduced in the house, the ethics bill further required the filing with the proposed ethics commission of a

10. TEX. REV. CIV. STAT. ANN. art. 6252-9b, § 1 (Supp. 1974).

11. H.B. 1, 63d Leg., Reg. Sess. § 3(a) (1973) (1st Printing).

12. *Id.* § 3(a).

13. *Id.* § 3(b).

14. *Id.* § 3(d).

separate financial statement by every state employee whose annual salary is in excess of \$15,000.00 and by every state officer.¹⁵ This financial statement was to include a complete account of the financial activity of the individual required to file and was to be a matter of public record.¹⁶ A financial statement was also required of a candidate for an elected office and was likewise to be a matter of public record.¹⁷

In the favorable report by the House Committee on State Affairs, the category of persons required to file the affidavit was modified to include "every state employee holding a public office or civil position of trust and receiving an annual salary in excess of \$12,000.00 . . . and [a] state officer who has a substantial interest in a business entity which is licensed and regulated by any state agency" ¹⁸ The exception of the Office of the Secretary of State and Comptroller of Public Accounts from the term "state agency" and the requirement of filing an affidavit upon acquisition or divestiture of a substantial interest in a licensed or regulated business entity were maintained in the bill as altered by the house committee.¹⁹ The more detailed financial statement was required of every state officer as well as of those employees receiving an annual state salary in excess of \$12,000.00 and candidates for an elected office.²⁰ As proposed in the original bill, both the affidavit and the financial statement were to be matters of public record.²¹

As approved by the Texas House of Representatives on March 9,

15. *Id.* § 4(a).

16. *Id.* §§ 4(a), 5(a). Throughout consideration of H.B. 1 in both the house and senate, the basic definition of "substantial interest" remained surprisingly constant. The original house bill defined the term as:

- (A) controlling interest in the business entity;
- (B) ownership in excess of 10% of the voting interest in the business entity;
- (C) any participating interest, either direct or indirect, by shares, stock, or otherwise, whether or not voting rights are included, in the profits, proceeds, or capital gains of the business entity in excess of 10% of the same; or
- (D) the holding of a position of member of the board of directors or other governing board, an elected officer or an employee of the business entity.

H.B. 1, 63d Leg., Reg. Sess. § 2(5) (1972) (1st Printing). Added to subparagraph (B) by the House State Affairs Committee was the alternative "or in excess of \$25,000 of the fair market value of the business entity." This alternative was removed by the senate, but replaced by the conference committee and appears in the enacted measure. TEX. REV. CIV. STAT. ANN. art. 6252-9b, § 2(12)(B) (Supp. 1974).

17. H.B. 1, 63d Leg., Reg. Sess. § 4(c) (1973) (1st Printing).

18. H.B. 1, 63d Leg., Reg. Sess. § 3(a) (1973) (house committee substitute).

19. *Id.* §§ 3(a), (b).

20. *Id.* § 4(a).

21. H.B. 1, 63d Leg., Reg. Sess. §§ 3(d), 4(b) (1973) (1st Printing).

1973, the categories of persons required to file and the type of filing reflected several alterations from the original and committee substitute bills. These changes resulted from floor amendments to the committee substitute. While maintaining the committee substitute provisions relating to who must file the affidavit concerning substantial business interests, a requirement was added that every state employee receiving an annual salary in excess of \$12,000.00, every state officer holding substantial interest in a licensed or regulated business entity, and all candidates for an elected office must also file a verified statement identifying any substantial interests in real property, stocks, bonds, or other commercial paper or business entities acquired, received or divested by the filing party during the preceding calendar year.²² Interests disclosed in this verified statement need only be listed by name or general description and not by their monetary value.²³ The verified statement, as well as the affidavit, were to be matters of public record.²⁴

House members, by floor amendment, also enlarged the category of persons required to file the financial statement by including members of the proposed ethics commission and its employees who receive an annual salary in excess of \$12,000.00.²⁵ Concerning the filing of the financial statement, earlier versions of the ethics bill had authorized the proposed ethics commission, on timely application of the filing party, to grant as much as a 60-day extension of time for filing the financial statement.²⁶ House members, upon passage of the bill, reduced this maximum extension period to 45 days, with no more than one extension to be given in any year.²⁷ The house-senate conference committee subsequently restored the 60-day delay provision.²⁸ While the original bill and the committee substitute contained a provision requiring the proposed ethics commission to notify each individual required to file the financial statement of the date of filing, the measure as approved by the house added that a member or employee of the ethics commission who knowingly or willfully fails to give such timely notice is guilty of a misdemeanor offense and subject to a penalty

22. H.B. 1, 63d Leg., Reg. Sess. § 3(d) (1973) (Engrossed, 3d Printing).

23. *Id.* § 3(d).

24. *Id.* § 3(e).

25. *Id.* § 4(a)(3).

26. H.B. 1, 63d Leg., Reg. Sess. § 4(d) (1973) (1st Printing).

27. H.B. 1, 63d Leg., Reg. Sess. § 4(e) (1973) (Engrossed, 3d Printing).

28. TEX. REV. CIV. STAT. ANN. art. 6252-9b, § 3(h) (Supp. 1974).

of not more than \$1,000.00 and/or confinement in the county jail for not more than 6 months.²⁹

Perhaps the most heated debate during house floor consideration of H.B. 1 resulted from an amendment by Representative Fred Agnich which proposed to alter section 4 of the committee substitute bill so as to strike the requirement that the financial statement be a matter of public record and substitute therefor authorization for filing this instrument with the proposed ethics commission in a sealed envelope.³⁰ A portion of the impetus behind the reform movement during the 63d Legislature had come from the proclamations of House Speaker Daniel and the strengthened Austin office of Common Cause, a self-proclaimed citizens' lobby. Indeed, it was common gossip among legislators that the Common Cause lobbyists and staff had been the primary drafters of much of the reform package of bills introduced in the house. It was apparent from press releases emanating from House Speaker Daniel's office and from Common Cause representatives that the thesis of many of the reform bills was their concept of the public's right of access to governmental deliberations and documents as well as to details concerning the financial status and business interests of public officials. To the reform lobby of Common Cause and to many house members, this latter concept was the very life blood of H.B. 1 and the so-called "Agnich amendment" authorizing the use of sealed envelopes for the financial statement was antagonistic to these groups' view of reform.

Central in the arguments in behalf of the Agnich amendment was the consideration of preventing unnecessary harrassment and embarrassment of state employees who, without the amendment, would be required to reveal detailed aspects of their financial status. Proponents of the amendment emphasized deep concern over the possible adverse effects of public disclosure of the financial statement upon the enlistment of qualified candidates for public office. This consideration, however, was possibly less significant than the interest in protecting the sizeable number of non-elected state employees from the necessity of publicizing their financial status.

To opponents of the Agnich proposal, however, the amendment represented a victory for the old style Texas politics which they blamed for the type of state government that gave rise to the Sharps-

29. H.B. 1, 63d Leg., Reg. Sess. § 4(g) (1973) (Engrossed, 3d Printing).

30. *Id.* §§ 4(h), 8.

town Bank scandals and the separation of the average citizen from what should be the public's business at Austin. So strong were the views of some legislators about the amendment's emasculation of the ethics bill, that its co-author, Representative Larry Bales, asked to be disassociated from the measure and voted against it on final passage in the house.³¹

The Agnich amendment pertained only to the financial statement required by section 4 of the bill and did not affect continuing public access to the affidavit and verified statement required by sections 3(a) and (d).³² Precedent for this procedure of filing sealed personal financial data came directly from similar federal regulations affecting federal civil service employees.³³ The amendment proposed by Representative Agnich and adopted by the house by a 7-vote majority provided:

The financial statement shall be sealed, prior to filing, in an envelope by the person required to file the statement. On the outside of the envelope the person shall give his name, address, the fact that a financial statement is enclosed, his position which required the filing, and the term of his office or a statement that he is employed for an indefinite period.³⁴

Should the proposed ethics commission determine by a majority that there is probable cause that a person filing the sealed financial statement violated a standard of conduct and that the information contained in the financial statement is pertinent to an investigation, the sealed envelope could have been opened for inspection by the ethics commission.³⁵ The amendment additionally provided that should a majority of the proposed ethics commission determine that the financial statement is relevant to an investigation, it could have made the contents of the statement public after giving the party notice and an opportunity to be heard before the commission.³⁶ When the person filing ceases to be a state officer or employee for a period of 2 years, the proposed ethics commission was to return the sealed envelope.³⁷ Although discontent with the amendment remained and a concerted effort was made to restore the provision requiring that

31. TEX. H.R.J. 1221 (1973).

32. H.B. 1, 63d Leg., Reg. Sess. § 8(a) (1973) (Engrossed, 3d Printing).

33. 5 C.F.R. § 1001.735-410 (1972).

34. H.B. 1, 63d Leg., Reg. Sess. § 4(h) (1973) (Engrossed, 3d Printing).

35. *Id.* § 15(a).

36. *Id.* § 15(b).

37. *Id.* § 8(b).

the financial statement be a matter of public record, the attempt failed to muster the necessary two-thirds majority.³⁸

During floor debate, the house also added a provision requiring an elected officer or candidate for elective office, who files a financial statement, to also file with the proposed ethics commission a source of income statement disclosing

[A]ll sources of occupational income, identified by employer, or if self-employed, by the nature of the occupation, including identification of any person, business entity, or other organization from whom he or she, or a business in which he or she has a substantial interest, received a fee as a retainer for a claim on future services in case of need and not received for services on a matter specified at the time of receiving the fee³⁹

Under this amendment and as finally passed by both houses, the filing party must list the category and the amount of each fee received by him, his spouse, and his dependent children over the period covered by the statement.⁴⁰ This source of income statement is also to be a matter of public record and was not affected by the Agnich amendment.⁴¹

The provision for indicating the source of retainer fees for a claim on future services requires the lawyer-legislator to list this type of fee by category and amount.⁴² Presumably, this added section also requires the lawyer-legislator to identify the client tendering the retainer fee which, when coupled with the fee disclosure, could result in a violation of the recognized confidence between attorney and client.⁴³ Furthermore, public disclosure of the category, amount, and source of fees received by a business in which he or she has a substantial interest would presumably include retainer fees for future services received by a law firm in which the filing party held a partnership position, even though that party individually performed no service to the client.

Public disclosure in this area presents another possible conflict with local and state Bar Associations' codes of ethics and the attorney

38. TEX. H.R.J. 1183-84 (1973).

39. H.B. 1, 63d Leg., Reg. Sess. § 4A (1973) (Engrossed, 3d Printing).

40. TEX. REV. CIV. STAT. ANN. art. 6252-9b, §§ 4(a), (c)(1) (Supp. 1974).

41. *Id.* § 9(a).

42. *Id.* § 4(c)(1).

43. Tex. Bar Ass'n Rules and Canons of Ethics, art. XII, § 8 (DR 4-101) (Supp. 1974).

and client relationships. This provision requiring the sources of income to be listed was removed from the house-approved bill by the senate, but it reappeared in the house-senate conference committee report approved by the legislature on May 28, 1973.⁴⁴ As a further limitation on the lawyer-legislator, the house-senate conference committee included the following language in section 7 of its version of the bill which subsequently became law:

(a) No member of the legislature shall, for compensation, represent another person before a state agency in the executive branch of state government unless:

- (1) the representation is made in a proceeding that is adversary in nature or other public hearing which is a matter of record; or
- (2) the representation involves the filing of documents, contacts with such agency, or other relations, which involve only ministerial acts on the part of the commission, agency, board, department, or officer.

(b) An offense under this section is a Class A misdemeanor.⁴⁵

Even though the house version of H.B. 1 was received by the senate on March 12, 1973, it was not until May 11, 1973, that the Senate Jurisprudence Committee revealed its version of the measure. The senate substitute for H.B. 1 contained no provisions requiring the filing of affidavits or verified statements as contained in the bill as passed by the house. A financial disclosure statement continued to be required and was to be filed with the Secretary of State on a form promulgated by him and the category of persons required to file was severely limited and no longer included non-elected state employees.⁴⁶

In adjusting the differences between the house and the senate versions of the bill, the house-senate conference committee provided for the filing of a financial statement with the Secretary of State (thereby eliminating the house proposed ethics commission) only by every elected officer, salaried appointed officer, appointed officer of a

44. TEX. REV. CIV. STAT. ANN. art. 6252-9b, § 4(c)(1) (Supp. 1974).

45. *Id.* § 7(a).

46. The persons required to file under the senate's version of the bill were the Governor; Lieutenant Governor; Attorney General; Treasurer; Comptroller of Public Accounts; Commissioner of the General Land Office; Secretary of State; Commissioner of Agriculture; members of the Railroad Commission; members of the Texas Supreme Court, the Texas Court of Criminal Appeals and courts of civil appeals; district judges; judges of courts of domestic relations; criminal district court judges; members of the legislature. H.B. 1, 63d Leg., Reg. Sess. § 2(1) (1973) (senate committee substitute).

major state agency, executive head of a state agency, and candidate for an elective office.⁴⁷ As used in the conference committee report, the term "elected officer" refers to (1) members of the legislature, (2) an executive or judicial officer elected in a statewide election, (3) judges of courts of civil appeals, district courts, courts of domestic relations, or juvenile courts, (4) members of the State Board of Education, or (5) an individual appointed to fill a vacancy or newly created elective office.⁴⁸ The term "salaried appointed officer" refers to an appointed officer who receives a salary as opposed to a per diem or other form of compensation.⁴⁹ An "appointed officer of a major state agency" refers to any member of 27 commissions, boards, or systems listed in the report.⁵⁰ "Executive head of a state agency" refers to the director, executive director, commissioner, administrator, or chief clerk who is appointed by the governing body or highest officer of a state agency to act as the chief executive or administrative officer of the agency.⁵¹

The conference committee report also requires every appointed officer who is not required to file a financial disclosure statement and who owns or has acquired or divested himself of a substantial interest in a business entity subject to regulation by a regulatory agency or one that does business with any state agency, to file an affidavit identifying the interest, its nature, and the manner of its regulation.⁵² Both the financial disclosure statement and the affidavit are matters of public record and are to be filed with the Secretary of State.⁵³ The house and the senate approved the conference committee report on May 28, 1973, the last day of the regular session of the 63d Legislature.

Who Should Serve As Depository and Enforcing Authority

The question of what individual or agency should serve as depository for the required disclosure instruments, as well as the enforcing authority, brought house and senate conferees to a deadlock, delaying final action on the measure until the last day of the legislative

47. TEX. REV. CIV. STAT. ANN. art. 6252-9b, §§ 3(a), (d) (Supp. 1974).

48. *Id.* § 2(2).

49. *Id.* § 2(4).

50. *Id.* § 2(5)(A).

51. *Id.* § 2(6).

52. *Id.* § 5(a).

53. *Id.* § 9(a).

session. Creation of a new and separate state agency designated the "State Ethics Commission," to act both as a depository and an initial enforcement authority, was considered a necessary feature of any meaningful ethics bill, by House Speaker Daniel, most of the house leadership, and the Common Cause lobby. Many house members, a majority of the senate, Lieutenant Governor Hobby, and Governor Briscoe, indicated serious reservations about the wisdom of creating another state agency for this purpose, the quality and character of whose membership could not be readily predicted.

The original house bill provided for the creation of an ethics commission of 12 members.⁵⁴ As amended on the house floor, the proposed ethics commission members were to be selected through transmittal of the name of one nominee for commission membership to the Secretary of State by the presiding judge of each judicial district in the state.⁵⁵ The Secretary of State was to then draw 12 of these names at random.⁵⁶ State officers, state employees, or individuals required to register under lobby control statutes were to be prohibited from membership on the Commission.⁵⁷ The proposed ethics commission powers were to include issuing advisory opinions (at the request of any state officer or employee or on its own initiative), employment of staff, publishing reports (excluding information in sealed envelopes), accepting and filing both required and voluntary information, holding meetings (in accordance with open meetings statutes), investigating alleged violations, administering oaths, taking depositions, and issuing subpoenas.⁵⁸ The original house bill also allowed any person to file a verified written complaint with the commission and delineated the procedure by which such complaints were to be dealt with.⁵⁹

54. Two members of the commission were to be appointed by each of the following: (1) the Chief Justice of the Texas Supreme Court, (2) the Presiding Judge of the Texas Court of Criminal Appeals, (3) the Attorney General, (4) the Governor, (5) the Lieutenant Governor, and (6) the Speaker of the House. H.B. 1, 63d Leg., Reg. Sess. § 9(a) (1973) (1st Printing).

55. H.B. 1, 63d Leg., Reg. Sess. § 9(b) (1973) (Engrossed, 3d Printing).

56. *Id.* §§ 9(c), (f).

57. *Id.* § 9(g).

58. *Id.* §§ 10(b), (c), (e), (g), (h), 11(b), (d), 12(a).

59. Basically, the procedure was as follows: a copy of the complaint was to be promptly forwarded to the alleged violator. No complaint could be filed more than 2 years after the date of the alleged violation. Should the commission determine that the complaint alleged facts sufficient to constitute a violation of the Act, it was then to have conducted a preliminary investigation of the alleged violation. If the investigation indicated probable cause existed for belief of the allegations, the commission would have conducted public hearings into the matter. By majority vote, the commission could have opened the sealed financial statement of the alleged violator and, if it de-

Senate opposition to this ethics commission concept remained steadfast throughout both senate consideration and confenence committee deliberations. During the session's final week, it became apparent to house proponents of the measure that insistence on inclusion of an ethics commission would effectively defeat passage of any ethics bill during the regular session. The conference committee bill approved by the house and senate on the session's final day follows the senate view and establishes the Secretary of State's office as the depository for instruments filed under the Act and makes the knowing or willful failure to file the required financial statement and/or affidavit a Class B misdemeanor.⁶⁰ Controversy between house leadership and senate leadership over the advisability of creating a state ethics commission continues, with the house interim committee scheduled to commence further hearings into the matter in September, 1973.⁶¹ With an easing of both public pressure on and legislator concern for major alterations in existing ethics statutes, the immediate future of the ethics commission concept appears bleak.

What Activities Should Be Prohibited

In addition to setting out several standards of conduct for persons holding a public office or position of trust, the house approved bill contained a list of prohibited acts for which a penalty was specified. Whereas the standards of conduct discouraged conflicts of interest in general language, the list of prohibited acts was directed towards specificity. Prohibited under terms of the house approved bill were (1) the voluntary and intentional use of official information gained solely through official position for private economic gain, (2) engaging in an official capacity in the sale, purchase, exchange, or lease of services or property to any business entity in which the official holds

terminated that the contents thereof were relevant to the investigation, it could have opened the statement to the public. At the conclusion of the hearing, the commission was to issue a written statement of fact findings to the house in which the respondent serves, if he is a legislator, or the Secretary of State in the case of any other state officer or employee, to the complaining party, to the Attorney General, and to the district attorney of the county where the violation occurred. An individual found by the commission to have violated the Act could have appealed by filing a petition for a declaratory judgment in the district court in the county of his residence or in Travis County. H.B. 1, 63d Leg., Reg. Sess. §§ 13, 14, 15, 16, 18 (1973) (Engrossed, 3d Printing).

60. TEX. REV. CIV. STAT. ANN. art. 6252-9b, §§ 10(a), (b) (Supp. 1974).

61. The House Committee on State Affairs, Subcommittee on Ethics, had its initial hearing scheduled for September 6, 1973.

a substantial interest, (3) representation by a legislator of another person before a state agency of the executive branch where it is a non-adversary proceeding not a matter of record and the representation involves contacts which invoke proprietary (rather than ministerial) acts on the part of the agency, (4) the receipt of compensation for exercising official duties or acts, and (5) the receipt of compensation or fees by a legislator, or a business entity in which he has a substantial interest, as a result of contracts or other business relationships with a state agency.⁶² The latter prohibition was not included in the house committee substitute version, the senate committee substitute, or the conference committee bill; otherwise the prohibited acts in the senate version of the measure were similar to the house bill.⁶³

The list of prohibited acts was substantially reduced by the house-senate conference committee, whose report received legislative approval. Representation of another for compensation by a legislator before a state agency, under the circumstances set out in both the final house and senate versions, is the only specific prohibited act listed.⁶⁴ Included in the conference committee measure, however, is a separate provision applying to an elected or appointed officer who is a member of a board or commission having policy direction over a state agency.⁶⁵ This provision requires such an officer to publicly disclose a personal or private interest in any measure, proposal, etc., pending before the board or commission involved.⁶⁶ Violation of this conflict of interest disclosure provision subjects the violator to removal from office on petition of the Attorney General or of the particular board or commission involved.⁶⁷ The standards of conduct provision adopted by the conference committee report are virtually the same as those which appeared in both the house and senate versions of the bill.⁶⁸

CONSTITUTIONALITY OF DISCLOSURE REQUIREMENTS

Eight days prior to house consideration of H.B. 1, Attorney Gen-

62. H.B. 1, 63d Leg., Reg. Sess. § 6 (1973) (Engrossed, 3d Printing).

63. H.B. 1, 63d Leg., Reg. Sess. § 4 (1973) (senate committee substitute).

64. TEX. REV. CIV. STAT. ANN. art. 6252-9b, § 7 (Supp. 1974).

65. *Id.* § 6(a). Officers subject to impeachment under Article XIV, Section 2 of the Texas Constitution are excluded.

66. TEX. REV. CIV. STAT. ANN. art. 6252-9b, § 6(a) (Supp. 1974). This provision is similar to the existing, somewhat ineffectual, constitutional disclosure provision affecting legislators. TEX. CONST. art. III, § 22.

67. *Id.* § 6(c).

68. *Id.* § 8.

eral John L. Hill forwarded to Representative David Finney, chairman of the House State Affairs Committee, a 13-page opinion concerning the constitutionality of the measure.⁶⁹ In that opinion, the Attorney General stated:

To be valid, a law such as this must not violate the separation of powers principle; it must be reasonable and fair in its application in order to satisfy due process, privacy and equal protection rights; its penal provisions must not be vague; and it must not otherwise conflict with constitutional provisions.⁷⁰

In declaring that no violation of the separation of powers doctrine appeared in H.B. 1, Attorney General Hill indicated that

in setting standards with which all persons entrusted with public responsibility must comply, the Legislature does not encroach upon the constitutional prerogatives of the other branches of the government; it acts in their aid, as well as its own, to promote public confidence in the integrity of all branches of the government.⁷¹

He found that the legislature was not interfering with the discharge of duties by other branches of state government and that, on this basis, no constitutional problem resulted.⁷² Attorney General Hill also found that application of provisions of the ethics bill to judges does not conflict with Article 5, Section 1-a of the Texas Constitution which creates the Judicial Qualifications Commission.⁷³

Categories of those state officers and employees who were to be required to file disclosure instruments by the various house versions of the bill presented perhaps the most serious constitutional problem. As stated in the Attorney General's opinion:

When the State commands disclosure by some, but not all, and makes a crime of the failure to disclose, its lines of demarcation must meet Fourteenth Amendment tests. Further, its invasions of privacy must not go so far as to leave unbalanced the individual and public rights.⁷⁴

It was agreed that while there is valid reason to assume that highly paid state employees are engaged in important public duties and should be subject to public examination, there is no valid distinction in this regard as to state employees who receive a salary below the

69. TEX. ATT'Y GEN. OP. NO. H-15 (1973).

70. *Id.* at 1-2.

71. *Id.* at 3.

72. *Id.* at 3, citing *State Bd. of Ins. v. Betts*, 158 Tex. 83, 308 S.W.2d 846 (1958).

73. TEX. ATT'Y GEN. OP. NO. H-15, at 4 (1973).

74. *Id.* at 6.

minimums as set out in the various house proposed bills. According to the Attorney General, such a classification, based solely on salary level, is unreasonable and subject to rejection by the Texas Supreme Court as an invasion of privacy not based upon the employees' function and authority.⁷⁵ Also questioned were the penal provisions of section 6 of the house bill on the basis of a "classification of persons" problem. "We doubt," wrote Attorney General Hill, "that anyone can legitimately be exempted from acting with integrity when others must do so or face criminal punishment."⁷⁶

As noted earlier, the senate version of H.B. 1 contained no classification by salary level and made the measure applicable only to an enumerated list of elected state officers. The Attorney General's views in this regard gave conference committee members representing the house the needed encouragement to delete the salary classification and to develop a function-oriented scheme of differentiation. The question remains, however, as to the reasonableness of the exclusions implied in the measure enacted when viewed against the equal protection provisions of the 14th amendment.

Powers which were to be granted to the ethics commission proposed by the house, especially in regard to the issuance of advisory opinions, subpoena of witnesses, and the absence of provisions for judicial review were also severely questioned by the Attorney General.⁷⁷ Outside of these reservations, Attorney General Hill summarized:

So long as the classification of persons and subjects covered is not unreasonable, the Legislature has the power to (1) require by ethics legislation that classes of state officers and employees in places of authority disclose information concerning relevant aspects of their financial life; (2) to provide criminal sanctions for specific unethical conduct (so long as the prohibited conduct is described with sufficient definition); and (3) to establish an Ethics Commission for investigating complaints of unethical conduct on the part of such state officers or employees, for making findings on those complaints, and for supervising the disclosure provisions.⁷⁸

75. *Id.* at 6.

76. *Id.* at 8.

77. *Id.* at 8-9.

78. *Id.* at 12. See TEX. ATT'Y GEN. LTR. ADVISORY No. 43 (May 21, 1973) concerning inquiries as to H.B. 1, 63d Leg., Reg. Sess. (1973) (senate committee substitute).

Conflicts, in regard to classification, between the Attorney General's opinion and the enacted H.B. 1 may well remain, and there is ample room for doubt as to the superiority of Attorney General Hill's view of the privacy question over that of his predecessor, Crawford Martin, as noted in the latter's formal opinion issued in 1971.⁷⁹

CONCLUSION

What advance, if any, regarding the ethics and public morality of those who labor in Austin in behalf of the citizenry of Texas has been achieved through enactment of the amended H.B. 1, remains an inquiry for future response. It is doubtful that the disclosure requirements of the Act would encourage a wrongdoer to clearly and accurately disclose any serious antecedent malfeasance on his part, but a state officer or employee may now extend more serious considerations toward his future official conduct. Legislative bodies may not realistically succeed in creating honest public servants solely by statutory enactment, but they can provide through this means substantial encouragement in that direction. Any more secure recourse would have us stand in the legislative chambers and echo the words of John Adams:

I pray Heaven to bestow the best of blessings on this house and all that shall hereafter inhabit it. May none but honest and wise men ever rule under this roof.⁸⁰

79. See TEX. ATT'Y GEN. OP. NO. M-1039 (1972).

80. 2 P. SMITH, JOHN ADAMS 1784-1826, at 1049 (1962).